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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. 266

WILLIAM ALFRED LUCKING and
MARGARET HOLMES DAVIS,
Petitioners and Plaintiffs Below,
vs.
FIRST NATIONAL BANK-DETROIT, a National
Banking Corporation, and
NATIONAL BANK OF DETROIT, a National
Banking Corporation,
Respondents and Defendants Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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To: The Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully show:

SUMMARY STATEMENT OF QUESTIONS INVOLVED

A. Lack of Jurisdiction—

(1) Can *resident* defendants remove from the State Court—*unless* plaintiffs' complaint shows a Federal Question Involved?

(2) Plaintiffs submit "no"—on the authority of

Gully v. First National Bank, 299 U. S. 109.

(3) The Honorable Sixth Circuit Court of Appeals misconstrued, it appears, *Gully v. Bank, supra,* to permit resident defendants to remove a State Court cause—if the complaint asked a recovery beneficial to a closed National Bank's creditors or stockholders.

In other words—the Court of Appeals, in sustaining removal, held that if moneys recovered in a simple accounting suit went eventually to a National Bank Receiver for distribution—

there resulted an action "for the winding up of the affairs" of a National Bank and thus making the State Court cause removable. That this was so even though Plaintiffs' complaint showed only State contract law and general accounting relief involved, and thus the complaint admittedly showed an entire absence of any action "arising under the Constitution or Laws of the United States",

within this Court's rule announced in *Gully v. First National Bank, supra.*

(4) The Lower District Court refused to remand the cause to the State Court on the authority of *Dinan v. First National Bank,* 117 Fed. (2d) 459.

The *Dinan Case* is the only case ever decided by the Sixth Circuit Court of Appeals where removal by a *resi-*

dent defendant was permitted in a case where no Federal Question was involved.

The briefs in the *Dinan case* in the Court of Appeals did not raise the question here raised, and the Court of Appeals seemingly fell into error in affirming the removal—

on the erroneous assumption that all cases of which the Federal District Courts were given original jurisdiction by Title 28, Section 41, U. S. C. A. could be removed by a *resident defendant,* when started originally not in the Federal Court, but in a State Court.

In affirming removal in the *Dinan case*—the Court of Appeals apparently overlooked entirely its opinions in

Venner v. Railroad, 293 Fed. 373;
Louisville, etc. R. R. v. Mottley, 211 U. S. 149;

holding the contrary—and also overlooked this Court's opinion in

Tennessee v. Bank, 152 U. S. 454.

(5) But this Court granted Certiorari in the *Dinan* case (314 U. S. 593) and a settlement was made out of Court and the Writ dismissed on the Dinans' petition—see 315 U. S. 824.

(6) In the District Court—in the *Dinan* case the plaintiff sued a closed National Bank for damages for breach of a lease and was enjoined by District Judge Arthur F. Lederle from proceeding further in the State Court—

But in the case at bar—the same District Judge (Hon. Arthur F. Lederle) dismissed with prejudice the defendants' Federal Court Injunction suit seeking to restrain the plaintiffs from further proceedings in the State Courts,

(R. 109) and no appeal was taken by the removing resident defendant Banks.

(7) Out of deference to the Court of Appeals' judgment entered April 21, 1944 (see opinion in 142 F. (2d) 528) in the case at bar sustaining the removal and refusing a remand—plaintiffs have not proceeded further in the State Court—awaiting this Honorable Supreme Court's possible issuance of its Writ.

Should the Writ not be issued—then Plaintiffs may proceed in the State Court, leaving final determination of this question of jurisdiction by this Court—on a review of the final judgment in this cause by the Supreme Court of Michigan.

(8) But a review of this important jurisdictional question here raised—by a writ issued upon this petition—would finally determine whether the Sixth Circuit Court of Appeals was right in its decision in *Venner v. R. R. supra,* or in the case at bar.

Thus a final decision by this Court would prevent any possible misconception in other Circuits of this Court's ruling in *Gully v. Bank, supra,* arising. For it seems obvious the opinion of the Court of Appeals in the case at bar conflicts with the *Gully* case opinion—and if this Honorable Court denies its Writ of Certiorari on this petition—all Circuit Courts of Appeal may have some doubt whether

Resident Defendants may remove from State Courts on grounds *other than* the "presence" of a Federal Question —shown by the complaint—(and as required by the *Gully* case opinion, see pages 114 and 115 of 299 U. S.) where it is stated:

"1. The suit is built upon a contract which in point of obligation has its genesis in the law of Mississippi. A covenant for a valuable consideration to pay another's debts is valid and enforceable without reference to a federal law. * * *

Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. * * *"

For a full discussion of *Gully v. Bank, supra,* see the Brief in support of this Petition.

B. The Dismissal on the Merits.

(1) Plaintiffs—in a prior class suit—originally commenced in the Federal Court—asked relief from a purchaser National Bank, on the ground that the Conservator appointed under Act of Congress had no authority to sell the assets of a closed National Bank, before a determination of insolvency by the Comptroller.

This first suit was dismissed (117 Fed. (2d) 159) on the ground that Plaintiffs had not made a *prior demand* upon the closed National Bank's Receiver (who had neglected for over five years to obtain the accountings of profits from the purchaser Bank specifically provided for by the sales contract) to bring the suit for accounting.

(2) After written prior demand—a second accounting suit was brought originally in the Federal Court at Detroit —setting forth the same cause of action against the purchaser bank.

This second suit was dismissed (129 Fed. (2d) 283) on the ground that Plaintiffs had not properly educated the Receiver and his attorneys how to bring the accounting suit—although the Receiver admitted (by his motion to

dismiss) his attorneys had prepared this sales contract, and that it specifically required accountings of profits by the Purchaser Bank and that he, as Receiver, had failed for over five years to require such accountings.

(3) The suit at bar was thereafter brought originally in the State Equity Court—for the accounting of profits required by the sales contract—but admitting the validity of the contract—and thus

making no claim (as in the first two suits) that under any Act of Congress the sale of assets was invalid.

NOTE: In the first case—the Federal District Court, Hon. Hiram Church Ford of Kentucky, presiding, had held Plaintiffs' Complaint sufficient for an accounting of profits —but that failure to make prior demand on the admittedly delinquent Receiver—was fatal, on motion to dismiss—for the Opinion see Exhibit D to the Complaint—R. 41.

(4) On April 21, 1944, the Honorable Sixth Circuit Court of Appeals affirmed by its judgment, the dismissal by the District Court of the case at bar (so removed from the State Court) on the ground, in effect, that the two prior decisions of dismissal (of the suits involving the issue of illegality under Acts of Congress of the sale of the assets) were *res adjudicata* of the complaint in the case at bar for simple accounting under an admittedly valid sales contract —to be construed solely by the Michigan State law where it was made and partially performed.

(5) Plaintiffs respectfully submit, therefore, that when—

(a) In the first suit—the defendants, purchaser Bank and the Receiver of the selling closed Bank, defeated an accounting of profits—on the sole ground

that no prior demand on the Receiver had been made to bring suit—that afterwards when proper demand was made—

they are estopped to defeat further actions for accountings of profits by the purchaser Bank—either as in the second suit—on the ground the Plaintiffs must tell the Receiver how to bring suit (when the books and records are all in his possession and plaintiffs have been repeatedly denied the right of inspection)—

or, as in the third suit, at bar, removed from the State Court—when Plaintiffs' complaint raises no issue of illegality of a sale contract under Acts of Congress (as in the first two cases) but admitting a legal sale—asks that rights of accountings of profits given by the sales contract—be enforced in the State Court against the resident National Bank of Detroit, which purchased the assets and agreed to make accountings of profits—and then admits, by motions to dismiss, it never did so.

SUMMARY OUTLINE OF FACTS

(1) A Derivative (class) suit for an accounting of profits was filed in the Michigan State Equity Court against the National Bank of Detroit, a resident of Michigan, as purchaser of certain assets from the Conservator of the closed First National Bank-Detroit.

The Contract of sale dated April 12th, 1933 (R. 25) expressly required that all purchased assets (bonds, notes and bills receivable and real estate mortgages) be sold by the Purchaser Bank prior to November 30, 1933—and all profits accounted for and paid over to the Conservator—afterwards Receiver of the Closed Bank.

(2) Motions to dismiss admitted such accountings and payments of large profits had never been made.

See paragraphs 7 and 8 of the Complaint, R. 5 to 8.

(3) The contract of sale valued these assets at about $63,000,000, was in ordinary terms, and required performance all within the State of Michigan—where the parties resided. R. 25 to 35.

(4) Plaintiffs' complaint expressly disclaimed all right to any relief "under or based upon any Act of the Congress of the United States",

and took the position that "their claims, interests and rights of action depend, arise and are based upon, under and by virtue of the laws of the State of Michigan and the common law in force in said State." (Complaint, paragraph 34, R. 22, 23.)

(5) Defendant National Bank of Detroit removed the cause to the Federal Court, Eastern District of Michigan on the grounds:

(a) That since the sold assets were in the possession and custody of a Conservator appointed by the Comptroller of the Currency, the "action involves a controversy arising under the laws of the United States. * * *" (Petition, paragraphs 3, 4, R. 45.)

(b) That the action was one "involving the winding up of the affairs of an insolvent National Banking association" (Petition, paragraphs 5 to 8, R. 46).

(c) The action is one of which "the district Courts of the United States are given original jurisdiction." (Petition, paragraph 9, R. 49.)

(6) The Closed First National Bank-Detroit was made a party defendant (under a State Court Rule that in derivative actions the corporation must be made a party) but the complaint expressly stated:

> "No relief is asked against the defendant First National Bank-Detroit, or any of its statutory or other agents, * * *."
>
> (Complaint, Paragraph 35, R. 23.)

(7) The Complaint (paragraph 36, R. 23) also expressly "tendered" any recoveries in the action to defendant closed Bank and its Agents, for the benefit of those entitled thereto, namely, "its depositors and * * * stockholders," and which "last named bank is made a nominal party defendant herein for the reason, among others, that its agents and directors have not and will not bring or attempt to bring this action in its behalf."

(8) The cause was removed to the United States Court (R. 53) and motion made by Plaintiffs to Remand on the principal grounds that:

> (1) It was not an action or suit of a civil nature, at law or in equity, "arising under the Constitution or Laws of the United States." (Motion, paragraph 4th, R. 57.)
>
> (2) It was not an action "for the winding up of the affairs" of a National Banking Association. (Motion, paragraph 7th, R. 57.)

(9) The Motion to Remand was denied (R. 59), a separate appeal taken from the order of denial of remand (R. 115) and affirmed by the Court of Appeals on the ground that the action was "one for the winding up of the affairs" of a National Bank—and thus within the original jurisdic-

tion of the District Court—and was, therefore, removable under Title 28 U. S. C. A., Section 41 (16) and 71.

(See Court of Appeals' Opinion, 142 F. (2d) 528.)

SUMMARY OF OPINIONS AND JUDGMENTS OF THE LOWER COURTS

A. The District Court's Decision—

On the Removal Questions—

1st—That Plaintiff's Complaint correctly stated that the contract of sale required the accountings of profits, the Court saying "there can't be much question about the meaning of the contract involved * * * just a question of requiring a public officer to do that which the law states that he shall do." (R. 104.)

2nd—"So, that leaves us in a position where there can't be any doubt about this being a case involving the winding up of the affairs of a national bank"—and the District Court concluded by saying that:

> "it makes no difference about the residence of the parties, * * * all of those cases come within the first sentence of Section 71 of U. S. C. A. Title 28." (R. 104.)

3rd—*On the merits*, in sustaining the motion to dismiss—

the District Court held the Complaint in the suit at bar—to be similar to the ones dismissed previously in the two suits originally started in the Federal Court—and in which dismissals were affirmed in 117 Fed. (2d) 159, and 129 Fed. (2d) 283, and

therefore, that the subsequent suit at bar—commenced in the State Court and removed—must be also dismissed. See R. 106.

That the two causes were not similar—and that the two prior ones were not *res adjudicata* of the suit at bar is discussed in the Brief in support hereof.

B. The Court of Appeals Decision—

1st—On the Question of Removal—

An examination of the opinion shows the Honorable Court of Appeals thought that the action was "one for the winding up of the affairs" of a National Bank, and was, therefore, within the *original jurisdiction of the Federal Courts,* and thus removable.

Thus, it is submitted, the Court of Appeals fell into error for it said in its opinion that "we think the *Gully case* has no application here."

But the Appellate Court did not attempt at all, in its opinion, to point out any part of the complaint which disclosed an action "arising" under the laws of the United States.

This Court said in its opinion, page 116 of 299 U. S. that:

> "We recur to the test announced in *Puerto Rico v. Russell & Co.*, 288 U. S. 467, 77 L. ed. 903, 53 S. Ct. 447, *supra:* 'The federal nature of the right to be established is decisive—not the source of the authority to establish it.' Here the right to be established is one created by the state. * * *"

In the case at bar—the right to an accounting under the sales contract—is created by the law of the State of Michigan—and not by any Act of Congress.

No construction of any law of Congress has any bearing whatever on the right to accountings of profits under this Sales Contract from a purchaser bank.

The claim of the Receiver of the closed National Bank that he is the authority to file the bill for accounting (as in the case at bar) is a mere matter of defense to be urged in the State Court—and does not present any Federal Question. The Honorable Sixth Circuit Court of Appeals knows this to be so—and so recognized in

Teague v. Brotherhood, 127 Fed. (2d) 53—

for a discussion of which please see Brief in support hereof.

2nd—On the Merits—

the Court of Appeals stated in its opinion that:

> "The complaint sets out no material allegations to differentiate this action from those presented in the preceding cases, and the application of the rules there announced dispose of the instant controversy."

It has been already pointed out that the case at bar is a simple complaint asking a simple accounting on an admitted legal sales contract—all of which is ruled by perfectly simple State law principles.

The first and second cases, above referred to, and originally started in the Federal District Court at Detroit—attacked the validity of the sales contract under the Bank Conservancy Act of 1933 of Congress.

No *res adjudicata* could thereby exist as to the present suit and moreover, that defense arises under State Laws and Common Law principles and is properly for the State Courts of Michigan.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. The Action at Bar is not a suit of a civil nature, at law or in equity, arising under the Constitution or Laws of the United States—and, therefore, is not removable by the resident defendants, from the Circuit Court for the County of Wayne, Michigan, In Chancery, to the District Court of the United States for the Eastern District of Michigan.

II. The Case at Bar should be remanded to the said State Circuit Court—where it originated.

III. This cause is not subject to dismissal on the ground of *res adjudicata,* by the judgments of dismissal entered in the two causes reported in 117 Fed. (2d) 159 and 129 Fed. (2d) 283 above referred to.

IV. This cause is not subject to dismissal for the reasons assigned by the Honorable Sixth Circuit Court of Appeals in entering its judgment of dismissal of April 21, 1944.

V. The defendants are estopped (by their previous motions to dismiss) to claim that Plaintiffs are not now fully entitled to maintain the accounting action at bar in the Michigan State Court, where it originated.

Wherefore, Your Petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of

the proceedings of said Court had in the case numbered and entitled on its Docket,

No. 9649

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a National Banking Corporation,
Defendants and Appellees

to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the Judgment of April 21, 1944, therein of said United States Circuit Court of Appeals for the Sixth Circuit be reviewed by this Court and for such other and further relief as this Court may deem proper.

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